In the Supreme Court of the United States.

OCTOBER TERM, 1969.

No. 440.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
RAYTHEON COMPANY ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF OF RAYTHEON COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Question Presented.

Whether the Court of Appeals acted within its authority in determining on the basis of the record before it that a petition for enforcement of a National Labor Relations Board order had been rendered moot.

Statement.

In a routine representation proceeding involving a unit of production and maintenance employees at Raytheon Company's plant at Mountain View, California, identified

on the records of the National Labor Relations Board as Case No. 20-RC-6201, the Board held three elections between February, 1965, and November 1, 1968. All three elections were lost by the Union. Subsequent to the first election, the Union filed unfair labor practice charges and objections to Raytheon's preelection conduct. The unfair labor practice proceeding, identified on the records of the Board as Case No. 20-CA-3554, was consolidated for hearing with the objections to preelection conduct in Case No. 20-RC-6201 (Petition Appendix C, p. 17). As noted in its brief, the Board found that certain preelection conduct not only constituted grounds for setting aside the first election, but also required entry of a finding of violation of section 8(a)(1) of the National Labor Relations Act and issued the usual order (Petition Appendix C, pp. 11-16).[1] While the Board's petition for enforcement of its order in Case No. 20-CA-3554 was pending in the Court of Appeals for the Ninth Circuit, the Board conducted a third election in Case No. 20-RC-6201 and certified the results thereof.

The merits of the Board's unfair labor practice findings, which are not before this Court on the Board's petition, were thoroughly briefed and orally argued by all parties in the Court of Appeals, Raytheon contending that the alleged statements upon which the unfair labor practice findings were based were a proper exercise of the right of free speech guaranteed by section 8(c) of the Act and the First Amendment to the United States Constitution. During oral argument, counsel for Raytheon made a suggestion of mootness in view of the fact that a certified election had been held while the unfair labor practice proceeding was pending in the Court of Appeals. With leave of court, Ray-

[1] As the merits of the unfair labor practice issues are not before this Court, the Hennemuth speeches and "Krest-Alvarado" incident will not be discussed in detail herein but Raytheon does not agree with the characterization of this conduct in the petition.

theon was permitted to supplement the record and move the dismissal of the proceedings. This motion was granted and the proceedings, including the Board's petition for enforcement, were dismissed (Petition Appendix A, pp. 8-9).

The Reasons for Denying the Writ.

The petition for a writ of certiorari and the decision of the lower court in this case present no issues warranting review by this Court. The Board's petition for enforcement was properly addressed to the discretion of the court below which "shall have power to . . . make and enter . . . a decree enforcing, modifying . . . or setting aside in whole or in part the order of the Board." 29 U.S.C. § 160(e). In granting the foregoing power, Congress charged the Courts of Appeals with the normal and primary responsibility for granting or denying enforcement of Labor Board orders. *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 340 U.S. 498. The statute provides further that the judgment and decree of the Court of Appeals shall be final except for review by this Court upon writ of certiorari. Certiorari is granted only "in cases involving principles, the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal." *Layne & Bowler Corp.* v. *Western Well Works*, 261 U.S. 387, 393.

The instant case involves neither an important question of national labor relations policy nor a real and embarrassing conflict of opinion and authority between courts of appeals. The court below was presented with a routine petition for enforcement of a Board order arising from its

finding that respondent had committed two violations of section 8(a)(1) in connection with a representation election. In dismissing the proceedings the court had before it a complete record, including briefs and oral arguments on the merits, supplemented by undisputed materials submitted by respondent. In effect, the court concluded on the basis of the facts in the record before it that it was not necessary to decide the merits of the substantive issues relating to the alleged unfair labor practice. This decision was well within the discretion of the Court of Appeals, the forum vested with primary responsibility for reviewing Labor Board orders and should not be reviewed here merely because this Court, if required to decide the motion to dismiss in the first instance, might have reached a different conclusion. *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 340 U.S. 498, *Federal Trade Commission* v. *American Tobacco Co.*, 274 U.S. 543.

The decision of the Court of Appeals does not conflict with *National Labor Relations Board* v. *Mexia Textile Mills, Inc.*, 339 U.S. 563, and *National Labor Relations Board* v. *Pool Manufacturing Co.*, 339 U.S. 577, two refusal-to-bargain cases, which enunciate the general proposition that compliance with Board orders does not render the order moot. Similarly, *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U.S. 261, the principal holding of which was the propriety of a Board order requiring an employer to withdraw recognition from an unlawfully dominated labor union, does not involve review by this Court of the authority of a court of appeals to dismiss a petition on the basis of the facts in the record before it.

Viewing the decision of the court below as an exercise of its discretion in dismissing a petition for enforcement on the basis of particular facts, there is not a "real and em-

barrassing conflict of opinion and authority between the courts of appeal." The three cases cited by the Board in its petition for certiorari involved the exercise of discretion by other circuits under essentially different facts and circumstances. In *National Labor Relations Board* v. *Marsh Supermarkets, Inc.*, 327 F. 2d 109 (C.A. 7), cert. den. 377 U.S. 944, the Board was seeking enforcement of section 8(a)(1) and 8(a)(3) violations committed in two separate bargaining units. Although respondent therein argued that a finding of a section 8(a)(1) violation based on a preelection speech was moot due to a subsequent certification, the Board's order was also based upon the fact that the same speech had been given to employees who were not affected by the second election. See *Marsh Supermarkets, Inc.*, 140 N.L.R.B. No. 83, 52 L.R.R.M. 1134 (1963). Consequently, it was necessary in any event for the Court to determine the merits of the substantive issues as to the validity of the speech.

In both *National Labor Relations Board* v. *Metalab-Labcraft*, 367 F. 2d 471 (C.A. 4), and *National Labor Relations Board* v. *Clark Bros. Co.*, 163 F. 2d 373 (C.A. 2), the question of mootness had been argued before the Board and in each case the court agreed with the Board that enforcement should be granted. *Metalab* involved not only section 8(a)(1) violations which were committed so early in the organizing drive that they may not have been as closely related to the representation election as were the alleged 8(a)(1) violations in the instant case but also involved 8(a)(3) violations. In *General Engineering, Inc.* v. *National Labor Relations Board*, 311 F. 2d 570 (C.A. 9), the Ninth Circuit considered as moot only certain 8(a)(1) violations closely related to the representation election, as in *Metalab*, the 8(a)(3) violations were considered on the merits as was an 8(a)(1) violation not so closely connected

to the representation election. The *Clark Bros.* case involved unfair labor practices directed on a broad scale to preventing exercise by employees of their right to organize and of a much more substantial nature than those involved in the instant case.

Basically, the question before the Court of Appeals is comparable to that presented by a request for issuance of a declaratory judgment—"whether the facts alleged, *under all the circumstances,* show that there is a substantial controversy, between the parties having adverse legal interests of sufficient immediacy and reality" to warrant the issuance of an enforcement order. (Emphasis supplied.) See *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.,* 312 U.S. 270, 273. In the instant case the Court of Appeals with the complete record before it was charged with the responsibility of determining under all the circumstances whether the Board's order should be enforced. There are facts in the record to support a conclusion of the Court that the alleged unfair labor practice violations were so indigenous to the particular election campaign and of such a marginal nature as to render determination of the merits of the Board's findings inappropriate. For example, the Court could have found that on the basis of the record the statements made were so closely related to the specific circumstances of this particular representation proceeding that, the proceeding being closed, the purpose of the Act would not be effectuated by enforcing the Board's order, even if the Board's position was sustained on its merits. In reaching such a decision in each case the Court could properly apply to the facts in the particular case such policy considerations as those raised in Point 2 of the Board's argument in the petition. The Court of Appeals having reached this decision on the facts of this case, its discretion under these circumstances is necessarily broad and a strong

showing of abuse must be made to reverse it. *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 340 U.S. 498; cf. *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 633.

The practical effect of the Board's position is to limit substantially the discretion of courts of appeals in reviewing Board decisions under the Act. The Board is requesting that this Court instruct the Court of Appeals that in the future it is not to consider the particular facts in cases of this type but must follow a rigid rule to be applied mechanically in all cases.

Conclusion.

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

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September, 1969.